

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. OP 17-0322

ROBERT D. BASSETT,

Plaintiff-Appellant,

v.

PAUL LAMANTIA; CITY OF BILLINGS,

Defendants-Appellees.

PLAINTIFF-APPELLANT'S OPENING BRIEF

On Certified Question from the United States Court of Appeals for
the Ninth Circuit Cause No. DV 15-35045

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ISSUE PRESENTED FOR REVIEW

This Court accepted the following certified question as formulated by the United States Court of Appeals for the Ninth Circuit:

Whether, under Montana law, the public duty doctrine shields a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the harm suffered by the plaintiff?

See Bassett v. Lamantia, D.C. No. 1:13-cv-00091-SHE (Docket Entry No. 51) (the “Certification Order”) (copy included at APP001-008).

STATEMENT OF THE CASE

This claim was originally filed by Plaintiff Bassett in State District Court in the Thirteenth Judicial District of Montana against Officer Paul Lamantia and the City of Billings. The claim arose from an incident of physical contact between Bassett and Officer Lamantia on July 16, 2012. Because of the physical contact, Bassett required surgery to repair a torn rotator cuff.

The original complaint had two counts: Count 1, a claim for negligence and Count 2, a claim under 42 U.S.C. § 1983. The complaint was later removed from state court to federal court based on the federal claim. Summary judgment on both claims was entered by the federal district court judge following a hearing on December 16, 2014.

Appeal from the judgment of the federal district court was timely filed with the Ninth Circuit Court of Appeals. Bassett appealed only the dismissal of the state law negligence claim; he did not appeal the dismissal of the federal claim.

On April 24, 2015, Bassett filed a motion with the Ninth Circuit Court of Appeals requesting an order certifying the question on the public duty doctrine to this Court. On May 24, 2017, the Ninth Circuit certified the question to this Court, and on June 6, 2017, this Court accepted the certified question.

STATEMENT OF FACTS

This Court accepted the certified question. The certification Order from the Ninth Circuit Court of Appeals recited these facts:

Around 12:30 a.m., Officer Paul Lamantia and his partner were dispatched to respond to a call about a neighborhood disturbance. Upon arriving at the scene, Lamantia observed a male suspect running into a driveway. The suspect jumped over a retaining wall and entered the backyard of the adjacent property, which was owned by Bassett. Lamantia identified himself as a police officer and ordered the suspect to stop. When the suspect continued running, Lamantia followed on foot and jumped over the retaining wall between the two properties. In the process, Lamantia dropped his flashlight.

Meanwhile, Bassett had come out of his house to investigate the commotion. While searching for his flashlight, Lamantia heard footsteps behind him and turned around to see Bassett approaching. Thinking that Bassett might be a threat to his safety, Lamantia tackled Bassett to the ground. As soon as he realized that Bassett wasn't a threat, Lamantia released him.

Bassett then indicated to Lamantia the direction in which the suspect had run and Lamantia continued his pursuit. Later that morning, Lamantia returned to Bassett's residence to check on him. Bassett

declined an ambulance or medical help at that time, but a few hours later called the police department to report that he sustained an injury from his encounter with Lamantia. Bassett was then diagnosed with a torn rotator cuff.

Almost a year later, Bassett sued Lamantia and the City of Billings under 42 U.S.C. § 1983 and also alleged a state law claim of negligence against Lamantia for failing to exercise reasonable care in performing his duties. The original complaint was filed in state court, but defendants removed the case to federal court. The district court entered summary judgment in favor of the defendants on both claims. As to the negligence claim, the district court found that the public duty doctrine shielded the defendants from liability:

I do not find that there was a special relationship existing between the plaintiff and the city. And I find, and rule, that the public duty doctrine does apply, and that the application of that public duty doctrine shields both defendants from any claims based upon negligence.

Bassett is appealing the dismissal of his negligence claim.

Certification Order at 3-5 (APP003-005).

Summary judgment was granted by the federal district court; no factual determinations have been made by a fact finder after listening to the testimony of the parties. Bassett disputes he was approaching Lamantia before he was tackled, and maintains he was standing in his front yard, at the corner of his house. *See Bassett v. Lamantia*, D.C. No. 1:13-cv-00091-SHE (Docket Entry No. 7-3) (Bassett Dep. 58:3-61:25. ER 050-53.) (copy included at APP009-012).

STANDARD OF REVIEW

Under MONT. R. APP. P. 15(3), this Court may answer a question of law certified to it by another qualifying court. Review in these cases is purely an interpretation of the law applied to the set of facts presented by the certifying court. *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 2009 MT 349, ¶ 4, 353 Mont. 173, 176, 219 P.3d 1249, 1252.

SUMMARY OF THE ARGUMENT

This Court should hold that the public duty doctrine does not apply to shield a law enforcement officer from liability for negligence where, as here, the officer is the direct and sole cause of the harm suffered by the plaintiff. In this case, Officer Lamantia was the direct and sole cause of the harm suffered by Bassett.

The district court erred when it granted summary judgment on Bassett's negligence claims in favor of Officer Lamantia and the City of Billings. The district court erroneously held that the public duty doctrine applied to Bassett's claims and shielded both Defendants from any claims based on negligence. Bassett was not injured by a third party; he was injured because Officer Lamantia tackled him to the ground.

This case should be decided based on regular negligence principles. Bassett is asking for an opportunity to present his case to a fact finder to decide based on common law negligence principles, whether Officer Lamantia was negligent.

ARGUMENT

I. THE PUBLIC DUTY DOCTRINE DOES NOT APPLY WHEN A LAW ENFORCEMENT OFFICER IS THE DIRECT AND SOLE CAUSE OF PLAINTIFF'S INJURY

In *Nelson v. Driscoll*, this Court explained that the public duty doctrine “expresses the policy that a police officer’s duty to protect and preserve the peace is owed to the public at large and not to individual members of the public.” *Nelson v. Driscoll*, 1999 MT 193, ¶ 21, 295 Mont. 363, 371, 983 P.2d 972, 977. In this case, Bassett has not claimed that Officer Lamantia failed to protect him from some outside harm. The harm was caused directly and solely by Officer Lamantia, and applying the public duty doctrine in this case would be a mistake.

To prevail on a negligence claim, a plaintiff must prove that the defendant had a legal duty; that the defendant breached that duty; and that the breach caused injury and damages. *Gatlin-Johnson ex rel. Gatlin v. City of Miles City*, 2012 MT 302, ¶ 13, 367 Mont. 414, 417, 291 P.3d 1129, 1132. When the public duty doctrine is invoked, the plaintiff’s negligence claims must fail because the plaintiff cannot establish a fundamental element of the claim—the existence of a duty owed to plaintiff by the government.

A. *Montana Courts Have Never Applied the Public Duty Doctrine to Cases Where the Law Enforcement Officer is the Sole Alleged Cause of the Plaintiff's Injury*

The public duty doctrine “provides that a governmental entity cannot be held liable for an individual plaintiff’s injury resulting from a governmental officer’s breach of a duty owed to the general public rather than to the individual plaintiff.” *Massee v. Thompson*, 2004 MT 121, ¶ 41, 321 Mont. 210, 225, 90 P.3d 394, 403. It is Bassett’s position that the public duty doctrine does not and should not apply in this case.

This Court has held the public duty doctrine does not automatically apply “whenever a public entity or person is a defendant in a negligence case.” *Gatlin-Johnson*, 2012 MT 302, ¶ 17, 367 Mont. at 419, 291 P.3d at 1133. In *Gatlin-Johnson*, this Court explained the situations in which the public duty doctrine is to be applied:

The public duty doctrine was not intended to apply in every case to the exclusion of any other duty a public entity may have. It applies only if the public entity truly has a duty owed only to the public at large, such as a duty to provide law enforcement services or regulate the practice of medicine. It does not apply where the government’s duty is defined by other generally applicable principles of law.

Id.

This Court has applied the public duty doctrine only in cases where the governmental officer failed to protect the plaintiff from harm caused by a third party or by some other independent source. *See e.g., Gonzales v. City of Bozeman*, 2009 MT 277, 352 Mont. 145, 217 P.3d 487 (holding that the public duty doctrine applied

to shield law enforcement officers who allegedly failed to protect plaintiff from a criminal suspect who assaulted her, where no exceptions to the doctrine applied); *Prindel v. Ravalli County*, 2006 MT 62, 331 Mont. 338, 133 P.3d 165 (holding that the special relationship exception to the public duty doctrine applied where stabbing victim alleged that the county jail negligently failed to incarcerate the perpetrator); *Latray v. City of Havre*, 2000 MT 119, 299 Mont. 449, 999 P.2d 1010 (holding that the special relationship exception to the public duty doctrine applied where plaintiff, who was a nurse, claimed that law enforcement officers allegedly failed to prevent an intoxicated assailant—over whom officers had custody and control—from assaulting her) (overruled on other grounds); *Nelson v. Driscoll* (holding that the special relationship exception to the public duty doctrine applied where a police officer voluntarily assumed the duty to protect the plaintiff, who was later killed by a motorist while walking on a road).

Several other jurisdictions have held that the public duty doctrine does not apply when a law enforcement officer is the sole alleged cause of the plaintiff's injury. *See e.g., Jones v. State*, 425 Md. 1, 25, 38 A.3d 333, 347 (2012) (“We therefore join our sister jurisdictions that recognize the public duty doctrine does not apply if law enforcement is not engaged in protecting the public from an injurious force caused by a member of the public, but rather is itself the alleged injurious force.”); *Liser v. Smith*, 254 F.Supp.2d 89, 102 (D.D.C. 2003) (holding that the

public duty doctrine “is wholly inapposite in a case such as this, where the alleged harm was brought about directly by the officers themselves, and where there is no allegation of a failure to protect.”); *Moses v. Young*, 149 N.C. App. 613, 616, 561 S.E.2d 332, 334 (2002) (“An exhaustive review of the public duty doctrine as applied in North Carolina reveals no case in which the public duty doctrine has operated to shield a defendant from acts directly causing injury or death.”).

B. This Case Should be Decided on Common Law Negligence Principles

Montana common and statutory law impose a duty upon all individuals to “use the degree of care that an ordinarily prudent person would have used under the same circumstance.” *Barr v. Great Falls Int’l Airport Auth.*, 2005 MT 36, ¶ 41, 326 Mont. 93, 101, 107 P.3d 471, 477; MONT. CODE ANN. § 27-1-701. In cases of direct acts of negligence by a government official causing physical injury to a member of the public, general principles of negligence should apply. In *Kent v. City of Columbia Falls*, this Court instructed that instead of automatically applying the public duty doctrine to any tort claim made against a public body:

[C]ourts should first determine whether a governmental defendant has a specific duty to a plaintiff arising from “generally applicable principles of law” that would support a tort claim. If a private person would be liable to the plaintiff for the acts that were committed by the government, then the governmental entity would similarly be liable. Where such a specific duty and breach exists, the public duty doctrine has no application.

Kent v. City of Columbia Falls, 2015 MT 139, ¶ 39, 379 Mont. 190, 201, 350 P.3d 9, 17.

In this case, if it had been a private person running through Bassett's yard that mistakenly tackled and injured him, that private person would certainly be liable for the damages caused by those injuries. The question is whether Officer Lamantia had a specific duty to Bassett that is sufficient to support a tort claim. *Ratcliff v. City of Red Lodge*, No. CV 12-79-BLG-DWM-JCL, 2014 WL 526695, at *6 (D. Mont. Feb. 7, 2014), *rev'd on other grounds by* 650 F. App'x 484 (9th Cir. 2016) (unpublished). "Duty turns primarily upon foreseeability, which depends upon whether or not the injured party was within the scope of risk created by the action of the alleged tortfeasor; that is, whether the injured party was a foreseeable plaintiff." *Gatlin-Johnson*, 2012 MT 302, ¶ 13, 367 Mont. at 417, 291 P.3d at 1132. Surely a property owner is a foreseeable plaintiff when a person comes onto the private property of another.

Following the instructions of this Court in *Kent*, it is clear that the public duty doctrine has no application to this case. The distinction is the direct act of physical contact between the government official and the public citizen. In these types of cases government officials should be held to a standard of conduct and duty not to negligently injure members of the public, even if they are acting within the course

of their duties as a public official. The public duty doctrine has no application under these circumstances.

CONCLUSION

In Montana, the public duty doctrine has only been applied to cases where the acts of third-party tortfeasors result in damage or injuries to Montana citizens. In these cases, law enforcement officers have had contact with the third-party tortfeasor, the public duty doctrine has applied to protect law enforcement officers from liability for the injuries to the Montana citizen caused by a third-party tortfeasor.

This case is vastly different. Robert Bassett was standing or walking, depending on which fact version is adopted by a fact finder, in his own yard on his own private property. Officer Lamantia made physical contact with Bassett, which resulted in substantial injury to Bassett. The federal district court ruled at the end of the summary judgment argument that Officer Lamantia owed no duty to Bassett, based on the public duty doctrine. This decision by the federal district court, if adopted by this Court, would be a major expansion for application of the public duty doctrine.

Government officials who commit direct acts of negligence that result in physical injury to Montana citizens should not have a blanket of immunity under the public duty doctrine. Holding government officials liable for the physical injury

resulting from their direct acts of negligence protects members of the public, even if they are acting within the course of their duties as a public official. To not hold these officials to any standard of care leads to a result where officials are given a “free pass”, no matter how negligent their acts may be.

Plaintiff Bassett requests this Court to answer the certified question from the Ninth Circuit Court by holding that under Montana law, the public duty doctrine does not shield a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the harm suffered by the plaintiff.

DATED this 17th day of July, 2017.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 17th day of July, 2017, I served a true and correct copy of the foregoing on the following persons by the following means:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2016, is 2,606 words, including all text, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 17th day of July, 2017.

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